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Nos. 00-596, 00-597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; and UNITED STATES TOBACCO COMPANY,

—and—

ALTADIS U.S.A. INC., AS SUCCESSOR TO CONSOLIDATED CIGAR CORPORATION AND HAVATAMPA, INC.; GENERAL CIGAR CO., INC.; JOHN MIDDLETON, INC.; LANE LIMITED, AS SUCCESSOR TO TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; and SWISHER INTERNATIONAL, INC.,

Petitioners,

—v.—

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF INFINITY OUTDOOR, INC. AND VISTA MEDIA GROUP, INC. IN SUPPORT OF PETITIONERS

FLOYD ABRAMS*
JOEL KURTZBERG
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Amici Curiae, Infinity Outdoor, Inc. and Vista Media Group, Inc.

* *Counsel of Record*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of Infinity Outdoor, Inc. ("Infinity") and Vista Media Group, Inc. ("Vista"), two of the nation's leading outdoor advertising companies.[1] Infinity, formerly known as Outdoor Systems, Inc., since its 1999 merger with Infinity Broadcasting Corporation, has been part of the world's largest outdoor advertising company and operates in 90 metropolitan markets in the United States. Vista is a leading outdoor advertising company operating predominantly in New York City and Los Angeles, which, as a minority-run business, specializes in serving the advertising needs of minority communities. Both Infinty and Vista, as primary participants in the outdoor advertising industry, believe in the importance of a strong First Amendment and of strong protections for commercial speech.

As leaders in the outdoor advertising industry, *amici* are interested in and deeply concerned about the potential for any ruling that might permit an effectively complete ban on outdoor advertising for an entire category of legal products. *Amici* are particularly interested in this case because it calls into question the very standard by which commercial speech restrictions should be reviewed by this Court. *Amici* submit this brief to urge this Court to determine that full First Amendment protection should be accorded to truthful, nonmisleading speech—regardless of its status as commercial or noncommercial.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution to its preparation and submission. In addition, the parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk of the Court.

Commercial speech, like political speech, contributes to the "marketplace of ideas," and not solely the market for goods. The flow of information about products—provided that information is truthful, and is not misleading to the public—should be unimpeded, in the interest of enabling citizens to make fully informed choices about both the products they wish to purchase and the broader social issues that frequently surround those products. When government restricts the information available to the people, under the guise of advancing particular social policies, it threatens the very core of this country's regard for the freedom of speech.

Amici urge the Court to abandon the unworkable and outdated test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), in cases where truthful, nonmisleading speech is at issue. In its place, in accord with the increasingly protective trend in the Court's recent commercial speech jurisprudence, the Court should expressly recognize that, except in circumstances when the state seeks to protect consumers from distinctly "commercial harms," there is no justification for treating speech differently simply because of its nature as advertising. Restrictions on such speech should be subject to strict scrutiny, as are restrictions on all other forms of protected speech.

SUMMARY OF ARGUMENT

In the twenty-one years since this Court first sought to set forth standards for determining when commercial speech should be deemed protected under the First Amendment, this Court has been repeatedly put to the painful task of determining how to apply those standards—and whether, in fact, the standards should continue to be used. This is the nineteenth case relating to commercial speech to be heard by the Court since it

issued its 1980 ruling in *Central Hudson*, a devotion of judicial resources that far outstrips that involving any other First Amendment issue—and, quite possibly, any other specific issue relating to the Bill of Rights.

In this brief *amici curiae*, we urge the Court to abandon the commercial speech test set forth in *Central Hudson* as ill-conceived, inconsistent with First Amendment theory and impossible to enforce on a consistent basis. We urge the Court instead to treat truthful, nonmisleading commercial speech the same as noncommercial speech—and to apply strict scrutiny to content-based, paternalistic regulations designed to protect the public from the perceived deleterious effects of such speech. In doing so, we rely heavily on opinions of at least five members of this Court, who have themselves expressed dissatisfaction with *Central Hudson*.

We submit that the rationales for affording commercial speech less protection than other forms of speech have been discredited, and, in any event, are wholly inapplicable to truthful and nonmisleading commercial speech. We also maintain that content-based restrictions on truthful, nonmisleading commercial speech implicate the same powerful First Amendment principles as content-based restrictions on noncommercial speech. Finally, we argue that *Central Hudson* has proven to be an unworkable standard that fails to provide the kind of predictability and consistency that the First Amendment demands. Accordingly, in cases where it is undisputed that the commercial speech at issue is truthful and nonmisleading, *Central Hudson* should be abandoned and strict scrutiny applied.

ARGUMENT

I. THIS COURT SHOULD TREAT TRUTHFUL, NONMISLEADING COMMERCIAL SPEECH THE SAME AS NONCOMMERCIAL SPEECH

A. The Rationales for Affording Commercial Speech Less Protection than Other Forms of Speech Are Constitutionally Insupportable

1. The Rationales for Providing Commercial Speech Generally with Limited First Amendment Protection

Since this Court first held that commercial speech is protected under the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), it has struggled with the question of just how much protection truthful, nonmisleading commercial speech should be afforded. In *Virginia State Board of Pharmacy*, a case striking down a Virginia statute making it illegal to advertise prescription drug prices, the Court made clear that commercial speech was entitled to significant First Amendment protection, subject to certain "common sense differences" between commercial and noncommercial speech that "suggest that a different degree of protection is necessary" between the two. *Id.* at 771 n. 24.

The Court identified two "common sense differences." The first was that the truth of commercial speech was more easily verifiable than that of noncommercial speech. The second was that commercial speech was, by its nature, more "durable" and less likely to be chilled than noncommercial speech by regulation. *See id.* The Court concluded that these differences made differential treatment between commercial and noncommercial

speech necessary in order "to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.*

From the outset, then, the goal of differential treatment between commercial and noncommercial speech was to facilitate truthful and nonmisleading commercial speech without hampering governmental efforts to limit untruthful or misleading commercial speech. Accordingly, the Court in *Virginia State Board of Pharmacy* both emphasized the "indispensable" nature of the free flow of truthful commercial speech and the fact that, under its holding, various commercial speech regulations designed to protect consumers from coercion or deception would still be permissible—*e.g.*, prohibitions against false or misleading speech; bans on advertising for illegal products; and appropriate warning or disclaimer requirements. *Id.* at 765, 770-72. What was *not* permissible under the First Amendment, the Court emphasized, were paternalistic government regulations aimed at protecting the public from the perceived dangers of their exposure to truthful commercial speech. The Court thus concluded that:

> "[O]n close inspection it is seen that the State's protectiveness of its citizens [*i.e.*, by prohibiting pharmacists from advertising drug prices] rests in large measure on the advantages of their being kept in ignorance. . . . There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them. . . . [T]he choice among these alternative approaches is not ours to make or the Virginia

> Assembly's. It is precisely the kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Id. at 769-70.

2. *Central Hudson* and the Expansion, Without Any Stated Rationale, of Limited Protection to Truthful and Nonmisleading Commercial Speech

Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court articulated a four-part test that sought to take into account the so-called "common sense differences" between commercial and noncommercial speech cited in *Virginia State Board of Pharmacy*. Commercial speech, the Court held, is protected by the First Amendment, as long as the speech in question (1) concerns lawful activity and is not misleading; if those criteria are met, the government may regulate the speech only if it can show (2) that its asserted interest in regulation is substantial, (3) that the regulation at issue directly advances that interest, and (4) that the restriction is "not more extensive than is necessary. . . ." *Central Hudson*, 447 U.S. at 566.

In a concurring opinion, Justices Blackmun and Brennan took issue with the new test, arguing that although permissible restraints on commercial speech had, until *Central Hudson*, "been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques," *Central Hudson*'s four-prong test opened the door to government imposition of the very paternalistic regulations of truthful commercial speech that *Virginia State Board of Pharmacy* had condemned—"covert attempt[s] by the State to manipulate the choices

of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson*, 447 U.S. at 574-75 (Blackmun, J., concurring in the judgment). In fashioning a test that left open the possibility that such paternalistic regulations might in some instances be deemed proper, the Court held for the first time, not only that commercial speech was entitled to less than full First Amendment protection, but that *truthful, nonmisleading* commercial speech was as well.

In doing so, the Court provided no rationale in *Central Hudson* for extending watered-down First Amendment protection to truthful, nonmisleading commercial speech, relying instead on the "common sense differences" between commercial and noncommercial speech cited in *Virginia State Board of Pharmacy* to justify differential treatment of commercial speech generally. *See Central Hudson*, 447 U.S. at 566. Since the Court decided *Central Hudson*, it has offered little explanation as to why less than full protection for commercial speech should be afforded beyond passing references to those "common sense differences."

Additional rationales—to the extent they exist at all—must be teased out of the case law, and all focus on the State's interest in regulating commercial transactions in order to address consumer protection-type concerns, such as full disclosure and fair dealing. For example, in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court noted that, because commercial speech is linked to the transactions it proposes, "the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to

regulate commercial speech that is 'linked inextricably' to those transactions.") (plurality opinion). Likewise, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court cited the State's "interest in preventing commercial harms" as the "typical reason" why commercial speech can be subjected to greater governmental regulation than noncommercial speech. *Id.* at 426. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (citing "commercial speech's potential to mislead" as the reason for limiting protection of commercial speech generally) (Stevens, J., concurring in the judgment). As these opinions suggest, there is little, if any basis, for limiting First Amendment protection for commercial speech absent the need to prevent the commercial harms associated with false or misleading speech.

Yet to date, this Court has never clarified its rationale for failing to provide truthful, nonmisleading commercial speech with full First Amendment protection (as opposed to commercial speech generally). Given that the rationale for commercial speech's lesser-protected status lies in the government's interest in enforcing consumer protection-type laws, it is not surprising that both members of this Court and legal scholars have increasingly asserted that, in cases where it is undisputed that the commercial speech at issue is true and nonmisleading, there is no legitimate rationale for limiting First Amendment protection. *See, e.g., Rubin*, 514 U.S. at 494 (citing "commercial speech's potential to mislead" as basis for limiting protection of commercial speech) (Stevens, J., concurring in the judgment); *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring in part and concurring in the judgment) ("Nor do I believe that the only explanations that the Court has ever advanced for treating 'commercial' speech differently from other speech can justify restricting 'commercial' speech in order to keep information from legal purchasers so as to

thwart what would otherwise be their choices in the marketplace."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 634-50 (1990) (questioning basis for general distinction between commercial and noncommercial speech and calling for an abandonment of that distinction). If there is a legitimate rationale for regulating truthful, nonmisleading speech more so than noncommercial speech, it has yet to have been articulated.

3. The Rationales for Limited Protection of Commercial Speech Have Been Discredited as Both Inaccurate and Irrelevant

Any "common sense" rationale for limiting protection for commercial speech generally has been thoroughly discredited as both inaccurate and irrelevant by a leading article on this subject. *See* Kozinski & Banner, 76 Va. L. Rev. at 637-38 ("[T]he Supreme Court's only two proffered justifications for affording commercial speech a lower level of protection, that it is more objective and more durable than noncommercial speech, really provide no support for treating it differently than noncommercial speech."). For example, the Court's first "common sense distinction" between commercial and noncommercial speech generally—namely, that it is easier to ascertain the truth of commercial speech—is simply untrue. Although in some cases, commercial speech makes factual assertions that are readily verifiable—*e.g.*, Supermarket X sells rice for $1/pound—the notion that commercial speech is inherently more "objective" than other forms of speech fails to take into account the realities of modern-day advertising. Consider a billboard ad that merely exclaims, "Coke is it!" The truth of that much trumpeted claim is not objectively verifiable at all. Or consider the television ads aired each year during the Super Bowl. Many of those ads make no factual asser-

tions at all, but rather present thirty-second mini-comedies that differ from fully-protected works of fiction only in length (*e.g.*, Budweiser's popular "Wassup?" ads). These mini-shows are no more "true" or "false" than any other work of fiction. *See id.* at 635-41.

In any event, the objective verifiability of a type of speech seems wholly irrelevant to the question of whether or not it should be entitled to full First Amendment protection. Speech about scientific matters is fully protected even though it is probably the paradigmatic type of verifiable speech. Any suggestion that the verifiability of scientific speech should make it subject to lesser First Amendment protections is wholly insupportable. *Id.* at 634.

The Court's second "common sense" rationale for giving commercial speech limited protection—that commercial speech is more durable than other types of speech because it is engaged in for profit—is equally problematic. For starters, it too is not necessarily true. As Kozinski and Banner point out, non-financial interests, such as religious convictions and artistic passions, can be just as strong, if not stronger, than financial ones. *Id.* at 637. Moreover, this Court has repeatedly held that the fact that protected speech is engaged in for profit does not strip it of its fully protected status. *See, e.g., Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952) ("That books, newspapers and magazines . . . are sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.").

In any event, even if commercial speech were more durable than other forms of speech, that would still not be a valid reason for stripping it of full First Amendment protection. The fact that a type of speech can thrive even after considerable regulation does not mean that it

should—or constitutionally may—be so regulated. In the end, the durability rationale—like that relating to verifiability—fails to provide justification for the lesser protection afforded commercial speech generally.

Even if the rationales provided by the Court for distinguishing between commercial and noncommercial speech generally were valid, neither provides any basis for permitting government to regulate truthful, nonmisleading commercial speech more strictly than noncommercial speech. This is especially so in circumstances where the purpose of the regulation is to keep the public unenlightened and to manipulate people's choices in the commercial marketplace for their own supposed benefit. *See 44 Liquormart*, 517 U.S. at 523 n.4 (Thomas, J., concurring in part and concurring in the judgment). Nor is there any legitimate justification for this kind of paternalism, which is so directly at odds with the interests of the First Amendment.

As the stated rationales for limited protection have been discredited, and in any event, clearly do not apply to truthful, nonmisleading commercial speech concerning legal products, the Court should apply strict scrutiny to regulations, like the one at issue in this case, that deal only with such speech and that do not implicate consumer protection concerns.

B. Content-Based Restrictions on Truthful, Nonmisleading Commercial Speech Implicate the Same Concerns as Content-Based Restrictions on Noncommercial Speech

In the noncommercial context, this Court has condemned content-based speech restrictions as "presumptively invalid" because they are antithetical to the core interests underlying the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "If there is a

bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control."). These principles, which justify the application of strict scrutiny in the context of noncommercial speech, apply equally in the context of truthful, nonmisleading commercial speech.

As the Court has noted, in the commercial speech context content discrimination not only impedes discussion concerning the various merits of products and services but also inhibits "debate over central issues of public policy" by limiting the public's knowledge of important facts relevant to such debate. *44 Liquormart*, 517 U.S. at 502 (plurality opinion). For example, a near-total ban on cigarette advertising, such as the one at issue in this case, could prevent the public from learning about new types of cigarettes that are specially designed to reduce the risks of getting cancer from smoking—a fact that, in turn, would plainly be relevant to those members of the public trying to decide whether or not (or to what extent) cigarette companies should be regulated by the federal government.

This Court has already acknowledged that content discrimination is no less harmful simply because the restricted speech falls into a category that traditionally receives less than full First Amendment protection. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down as facially invalid a city ordinance which

made it a misdemeanor to " 'place[ ] on public or private property' " any object or symbol which a person knew or had reason to know would " 'arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . .' " *Id.* at 380. Although the Court acknowledged that the ordinance only prohibited expression which fell within the traditionally unprotected category of "fighting words," *id.* at 381, it still struck the ordinance down, reasoning that even traditionally unprotected "fighting words" could not be selectively silenced on the basis of the underlying message expressed. *Id.* at 391.

The Court's holding in *R.A.V.* established that, should the state wish to regulate only some of a particular kind of unprotected (or less than fully protected) expression, it may not distinguish the regulated speech from the unregulated speech based on aspects of the speech's content that have nothing to do with the justifications for affording it no (or less) protection. Thus, "a State might choose to prohibit only that obscenity which is the most patently offensive in its prurience. . . [b]ut it may not prohibit, for example, only that obscenity which includes offensive political messages." *Id.* at 388.

The Court explicitly stated that this principle applied to commercial speech regulations aimed at specific content:

> "[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there . . . . But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

Id. at 388-89 (citing, *inter alia*, *Virginia State Board of Pharmacy*, 425 U.S. at 771-72).

Thus, under *R.A.V.*, the lesser protection for commercial speech means that the state is free to regulate some commercial speech content, but only that content based on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection"—such as consumer protection concerns about ensuring a fair bargaining process. *Id.* at 388. It was this principle that Justice Stevens adverted to in *44 Liquormart* when he, along with Justices Kennedy and Ginsburg, effectively endorsed application of strict scrutiny to content-based restrictions on the advertising of alcohol prices, in a case where those restrictions failed to implicate consumer protection concerns:

> "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."

44 Liquormart, 517 U.S. at 501 (plurality opinion). In that same opinion, the *44 Liquormart* plurality applied this same reasoning to conclude that "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it] with offerors communicating to offerees.' " *Id.* at 499

(quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96, (1977)). *See also Carey v. Population Services International*, 431 U.S. 678, 701 n. 28 (1977) (content-based commercial speech regulations "directed not at any commercial aspect of the prohibited advertising, but at the ideas conveyed" violates the "core of First Amendment values").

The First Circuit's application of *Central Hudson* in this case—in direct contravention of *R.A.V.* and *44 Liquormart*—upheld the content-based cigarette advertising regulations, even though the reason for such content discrimination was wholly unrelated to the consumer protection interests typically cited as the justification for according commercial speech less than full First Amendment protection. Since paternalistic regulations limit content for the sake of purportedly protecting consumers from it—as opposed to concerns about protecting consumers from commercial harms such as false or misleading advertising—they should be subjected to strict scrutiny.

The appellate court in this case explicitly acknowledged that the Massachusetts regulations at issue were content based. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 42 (1st Cir. 2000). And though the Attorney General proffered Massachusetts' desire to " 'eliminate deception and unfairness in the way [tobacco products] are marketed, sold and distributed,' " *Id.* at 43 (*citing* 940 C.M.R. §§ 21.01, 22.01) as one of the State interests to be analyzed under the *Central Hudson* test, the Court specifically found that the regulations did not directly advance that interest. *Id.* at 49 n. 11. The interests acknowledged by the appellate court—*e.g.*, protection of children from the health hazards of smoking—were unrelated to the consumer protection issues that underlie the rationale for limited protection of commercial

speech in the first place. Nevertheless, the court below upheld the regulations, applying the intermediate scrutiny test of *Central Hudson*. Under *R.A.V.*, however, strict scrutiny should have been applied.[2]

C. *Central Hudson* Has Proven to Be an Unworkable Standard that Fails to Provide the Type of Consistency and Predictability that the First Amendment Requires

As this Court recently noted in its last commercial speech case, *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), because the *Central Hudson* test has proven to be overly-complex, "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." 527 U.S. at 184. But the intricacy of the test was only part of the reason so many esteemed jurists, lawyers, and scholars have called for *Central Hudson*'s reversal. *Id.* Another, more important contributing factor is the fact that the test has proven to be both unworkable and unpredictable. As Justice Thomas explained in his concurring opinion in *44 Liquormart*:

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[2] A number of lower courts have either applied or considered applying *R.A.V.* to content-based commercial speech restrictions. *See MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (acknowledging potential application of *R.A.V.* to content-based commercial speech regulation); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *R.A.V.* and *Central Hudson* to speech regulation without deciding which is required); *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 n.7 (D.N.J. 1992) ("It is clear from the Supreme Court's decision in *R.A.V. v. City of St. Paul*, that commercial speech must be protected by the usual strictures against content-based restrictions.").

> "The courts, including this Court, have found the *Central Hudson* 'test' to be, as a general matter, very difficult to apply with any uniformity. This may result in part from the inherently nondeterminative nature of a case-by-case balancing 'test' unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test."

44 Liquormart, 517 U.S. at 526-27 (Thomas, J., concurring in part and concurring in the judgment). Several leading commentators have agreed. *See, e.g.*, Kozinski & Banner, 76 Va. L. Rev. at 630 ("[C]ases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not."); David P. Kasakove, *New York State Association of Realtors, Inc. v. Shaffer: When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins*?, 61 Brooklyn L. Rev. 397, 409-10 (1995) ("Rather than giving much-needed direction to the lower courts, the Supreme Court's case-by-case approach [based on *Central Hudson*] has led to such unpredictability that [u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner.") (internal quotation omitted); R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 Denver U. L. Rev. 137, 162-66 (1994) (illustrating the unpredictable nature of commerical cases applying *Central Hudson*).

In the twenty-one years *Central Hudson* has been the law governing commercial speech cases, it has been modified several times but never sufficiently to address the problems inherent in the test. For instance, in 1986, in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court so diluted prong three of the test that it merely required the government to show that it had a reasonable belief that its

speech restriction would in fact advance the government's asserted goal. *Id.* at 341-42. All this changed by 1993, when, in *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court strengthened prong three considerably, now requiring government to affirmatively "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771.

Likewise, prong four of *Central Hudson*, as interpreted in *Posadas*, provided little protection for commercial speech, requiring courts to defer to the legislature's judgment concerning the viability of less speech-restrictive alternatives. *Posadas*, 478 U.S. at 344. Once again, however, in 1993, the Court rejuvenated prong four, holding in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), that it is not met if there are "obvious less-burdensome alternatives to the restriction on commercial speech." *Id.* at 417 n.13. Yet only a few months after *Edenfield* and *Discovery Network* were decided, the Court decided *United States v. Edge Broadcasting Co. T/A*, 509 U.S. 418 (1993), in which it upheld a federal statute prohibiting the broadcast of lottery advertising by broadcasters licensed in states that do not allow lotteries. In that case, the Court seemed to rely more heavily once again on *Posadas*' more deferential standard for prongs three and four. *Id.* at 427-30. Three years later, in *44 Liquormart*—a case in which no opinion of the Court garnered a majority—the Court abandoned *Posadas* altogether, concluding that "*Posadas* erroneously performed the First Amendment analysis." *44 Liquormart*, 517 U.S. at 509.

In the twenty-one years since *Central Hudson* was decided, this Court has heard 19 commercial speech cases (including this case)—an average of almost one case each term.[3] No other First Amendment issue has

[3] *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San*

consumed more time of the Court in this time period. Of the nineteen cases, the Court granted *certiorari* in only one of them—*Greater New Orleans Broadcasting Ass'n*—in order to resolve a circuit split. In the remainder of the cases, review was necessary to clarify and reclarify the confusing and ever-elusive *Central Hudson* standard. If *Central Hudson* is not abandoned, there is little reason to believe that this trend will not continue.

As a result of all of this confusion, *Central Hudson* today means different things in different courtrooms. Some courts have applied the test more stringently, borrowing from this Court's recent, and more protective, line of cases. *See, e.g., Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 99-101 (2d Cir. 1998); *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997). Others, however, like the court of appeals here, continue to rely on this Court's earlier and less speech-protective line of cases. *See also Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1994), *vacated on other grounds*, 518 U.S.

Diego, 453 U.S. 490 (1981); *In re R.M.J.*, 455 U.S. 191 (1982); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489 (1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999).

1030, *readopted on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

Not surprisingly, then, some lower courts have openly criticized *Central Hudson* and have called on this Court to bring more clarity to commercial speech doctrine. The D.C. Circuit has described the *Central Hudson* standard as "perplexing," concluding that, when taken together, the Supreme Court's decisions in commercial speech cases "leave little insight as to what criteria the Court used. . . ." *Kansas v. United States*, 16 F.3d 436, 443 (D.C. Cir. 1994). And in *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997), the Ninth Circuit concluded that, "the *Central Hudson* test is not easy to apply and the cases . . . might suggest it is sufficiently flexible to accommodate 'good' commercial speech and to suppress that which is 'not so good.' " *Id.* at 712.

Unfortunately, the problem of *Central Hudson*'s unpredictability is unlikely to be solved by making yet additional modifications to the test. The problem is with the indeterminacy of the test itself. For instance, the test's third prong requires examination of whether or not the regulation at issue will "in fact" advance the government's substantial interest "in a direct and material way." As one commentator has observed, the courts have contrasted the concept of "direct" advancement with connections that are described as "tenuous, highly speculative, ineffective, only remotely supportive of the government interest, conditional, or involving only limited incremental, speculative or marginal support for the government interest. The potential for these concepts, which are largely just opposing end points on progressive continua, to serve as merely conclusory labels for opposing outcomes is obvious." Wright, 72 Denv. U. L. Rev. at 164-65 (internal footnotes omitted).

The forth prong poses similar problems. That prong requires the regulation to have a "reasonable fit" with its purported ends so that it does not burden more speech than is necessary. But the trade off between a slight reduction in promoting the government's stated interest and a slight reduction in the burden on freedom of speech is far from a precise calculus. The indeterminacy of the test merely "invites the expression of a court's predisposition." *Id.* at 166.

It is not surprising, then, that leading commentators and at least five members of this Court have expressed increasing dissatisfaction with the *Central Hudson* test and have expressed a willingness to reconsider its continued validity. *See 44 Liquormart*, 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 517-18 (Scalia, J., concurring) (expressing his "discomfort with the *Central Hudson* test," and stating that he is not "disposed to . . . reinforce" it); *id.* at 528 (Thomas, J., concurring) (rejecting application of *Central Hudson* entirely); *see also Rubin*, 514 U.S. at 493 (Stevens, J., concurring) (discussing the "misguided approach adopted in *Central Hudson*"); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes & Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 126 (1996) ("After *Liquormart*, it is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles."); Kozinski & Banner, 76 Va. L. Rev. at 648-52 (calling for the abandonment of *Central Hudson* and adoption of strict scrutiny). In the Court's last commercial speech case, *Greater New Orleans Broadcasting Ass'n*, the Court acknowledged *Central Hudson*'s precarious status, but found it unnecessary to address its continuing viability. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 184. The Court should take this opportunity to provide truthful, nonmisleading

commercial speech with the full First Amendment protection it has always deserved.

CONCLUSION

This case should be analyzed under a strict scrutiny test, and the decision of the Court of Appeals for the First Circuit should be reversed.

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Respectfully submitted

FLOYD ABRAMS*
JOEL KURTZBERG
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Amici Curiae, Infinity Outdoor, Inc. and Vista Media Group, Inc.

* *Counsel of Record*